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In The

Supreme Court of the United States

October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO, in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK ATTORNEY GENERAL'S OFFICE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL SOCIETY, THE UNITED STATES CATHOLIC CONFERENCE, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE FAMILY RESEARCH COUNCIL, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE HOME SCHOOL LEGAL DEFENSE ASSOCIATION, THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This case is a remarkable paradigm of First Amendment violations. The government officials in this case, including the courts below, have breached the First Amendment in the following ways: violated the neutrality requirement of both the Free Exercise and Establishment Clauses; discriminated against speakers because of their religious status and religious ideas; engaged in excessive entanglement with religious doctrine; discriminated among religious viewpoints; exercised unbridled discretion in determining whether citizens' speech is religious; and enforced a content-based restriction on religious speech without a reasonable, let alone compelling, justification for its censorship.

The facts are straightforward. A governmental body refused to allow a film series to be shown because it contained religious ideas. In the film series, Dr. James Dobson, a nationally recognized child psychologist, and Mrs. Shirley Dobson, author of a book on family traditions, address a variety of issues facing the American family today, ranging from practical parenting techniques to social issues that affect families.

To determine whether the film series was "religious", a government official read a brochure about the film. Based on the brochure, the government denied permission to show the film for three specific reasons: 1) the film advocated "a loving home where Christian values are instilled from an early age"; 2) in one part, Mrs. Dobson "recall[ed] the influences which brought her to a loving God"; and 3) Mrs. Dobson "has been active in a variety of Christian endeavors." (Trial transcript, hereinafter "Tr." at 65-66 (test. of Alice Schoener).)

The school district does not claim that it denied access for pedagogical reasons or because the community group posed any threat of disruption. Instead, the school district claims that state law left it no discretion but to deny access to the film series. (Br. of Def.-Resp't [School District] in Op. to Pet. for Cert. at 3, 8.)

The refusal to allow the film series to be shown violates the First Amendment in a multitude of ways. Most importantly, a policy that facially discriminates against religious persons and their expression violates the core requirement of the Religion Clauses that the State treat religion with neutrality. *See generally, e.g., Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). The State may not discriminate against a person because of his or her religious beliefs or religious status, as the State has openly done here. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

In its discriminatory treatment of religious expression, the State not only violates the Free Exercise Clause

but also the Establishment Clause. A facially discriminatory policy necessarily has the effect of inhibiting religion and, indeed, conveys a message of hostility toward religious persons who are excluded from an expressive forum solely because their speech is religious. *See Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 248 (1990).

Furthermore, as this case vividly demonstrates, excessive entanglement inevitably follows from a facially discriminatory policy that requires government bureaucrats and judges to sift through various community group uses of facilities to determine which are "religious." *See, e.g., Widmar*, 454 U.S. at 272 n.11; *Mergens*, 496 U.S. at 253. The record in this case discloses several alarming spectacles: a school district clerk pouring over a brochure to determine whether a film is religious; a federal district judge "knowing" that the Salvation Army is not religious because of the "kind of names" on its board of directors and the fact that he personally knows some of them "as non-Christians," (Tr. at 46-47); and federal appellate judges deciding what activities are and are not "religious in any meaningful way." (Pet. App. at 14a.) Such actions by local officials and federal judges are a parody of the First Amendment.

This sifting of uses to determine which are religious also fosters discrimination *among* religious viewpoints, another important Establishment Clause prohibition. *See Larson v. Valente*, 456 U.S. 228, 244-246 (1982). Parallel to these Establishment Clause concerns, the Free Exercise and Free Speech Clauses prohibit government officials' unbridled discretion to determine whether citizens'

speech is religious. *See Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940).

A facially discriminatory policy also violates the core of the Free Speech Clause. The school district's denial of equal access is a content-based restriction on religious speech in a designated public forum, indistinguishable from the university policy struck down in *Widmar*.[1] The school district through policy and practice has set aside the school facilities during specified nonschool hours for community groups to use. Its stated reason for denial of access to show the film series is that the film contains religious content. No compelling state interest supports this ban, given that equal access for private religious speakers to a forum does not violate the Establishment Clause but instead avoids potential violations of the Free Speech, Free Exercise, and Establishment Clauses. *Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 273; *see also*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Moreover, even if this were a nonpublic forum, which the court below expressly found it was not, (Pet. App. at 9a), the government may not deny access based on a speaker's religious viewpoint. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). For example, although it banned this film series on family issues from an evangelical Christian perspective, the school district has permitted a family counseling service, affiliated with a religious group, to

[1] As in this case, the university did not deny access to the religious group but conditioned access on the group agreeing not to use the university facilities for "religious worship" or "religious teaching." *Widmar*, 454 U.S. at 265 n.3.

use school facilities for counseling sessions, board meetings, and a fundraising event. (Tr. at 29, 34 (test. of Ruth Bragarnick).)

Once again, this Court is asked to sanction State censorship of private religious speech. In rejecting numerous past attempts to censor private religious speech, this Court has intentionally and wisely avoided the morass created by the court below, whereby State officials, including judges, determine whether citizens' speech is religious. If allowed to stand, the decision below signals "open season" for the suppression of religious speech on virtually any public property by any federal, state, or local official.

ARGUMENT

This case can be approached through two distinct, yet parallel, lines of precedent – either through public forum analysis or analysis under the Religion Clauses. Both lines of precedent compel the same result: discriminatory treatment of religious speakers and religious expression violates the First Amendment. However, analysis under the Religion Clauses offers a simpler way than the multi-tiered public forum analysis to resolve cases involving content-based exclusion of religious speech. Because public forum analysis, while favorable to Petitioners, is not necessary to decide this case, *amici* will address the violation of the Religion Clauses first.

I. A POLICY THAT FACIALLY DISCRIMINATES AGAINST RELIGIOUS SPEECH VIOLATES A CORE REQUIREMENT OF THE RELIGION CLAUSES THAT THE STATE TREAT RELIGION WITH NEUTRALITY.

A. A policy that facially discriminates against religious persons and religious expression inhibits religion in violation of the Religion Clauses.

Facially discriminatory treatment of private religious expression and private religious speakers cuts to the core of the Free Exercise and Establishment Clauses, both of which mandate state neutrality toward religion. As this Court recently emphasized in another case involving equal access for religious groups to public school facilities, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. As this Court has reiterated in both free exercise and establishment decisions, "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).[2]

Both Religion Clauses prohibit the State from singling out private religious expression for censorship. As

[2] Neutrality has been a common thread throughout otherwise diverse cases. *See, e.g., Weisman*, 112 S.Ct. at 2656 (1992); *Smith*, 494 U.S. 872 (1990); *Texas Monthly v. Bullock*, 489 U.S. at 8-9 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981); *McDaniel*, 435 U.S. at 629 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968); *Everson v. Board of Educ.*, 330 U.S.1, 18 (1947).

this Court recently reaffirmed, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Weisman*, 112 S.Ct. at 2656. The school district's policy, which bans use "by any group for religious purposes," (Pet. App. at 57a), lacks the facial neutrality that the Religion Clauses require.[3]

Under the Free Exercise Clause, the State may not prohibit otherwise permitted acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. The school district policy is the hypothetical law condemned in *Smith*. Rather than prohibiting the "casting of 'statues that are to be used for worship purposes,' " *id.* at 877-878, the school district has prohibited access for "religious purposes," and banned this film, which, but for its religious content, would be permitted.

Similarly, if the permissibility of a use depends upon a citizen's motives, religious motives must be included among the motives that are legally permitted. *See Smith*, 494 U.S. at 884, ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons"). The state allows community groups access to school facilities during specified nonschool hours for a

[3] The facial neutrality at issue in this case does not require the Court to revisit the issue of whether a substantive definition of neutrality requires exemption for religious objectors to facially neutral, generally applicable laws. *See generally*, Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L. Rev. 993 (1990).

broad variety of reasons, including "social, civic and recreational . . . and other uses pertaining to the welfare of the community", New York Education Law Section 414(c) (McKinney 1988 and Supp. 1992) (Pet. App. at 52a), yet singles out religion for direct discriminatory exclusion. But religion may not be excluded from the broad universe of "uses pertaining to the welfare of the community."

Nor may the school district prohibit the film because one of its featured speakers "has been active in a variety of Christian endeavors." (Tr. at 66 (test. of Alice Schoener).) It is a cornerstone of free exercise jurisprudence that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel*, 435 U.S. 618 (1978)).

A facially discriminatory policy violates the standards set forth in this Court's Establishment Clause decisions as well. "The core notion animating the requirement that a statute possess a secular legislative purpose and that its principal or primary effect be one that neither advances nor inhibits religion is . . . that government may not be overtly hostile to religion. . . . " *Texas Monthly*, 489 U.S. at 9 (plurality opinion) (quotation and citation omitted). A policy that facially discriminates against religion strongly evinces a governmental purpose to "disapprove of religion". *Cf., e.g., Jaffree*, 472 U.S. at 56; *id.* at 75 (O'Connor, J., concurring) (statute facially invalid because facial inclusion of prayer suggests the "primary purpose of endorsing prayer").

Enforcement of a facially discriminatory policy necessarily has a primary effect of inhibiting religion. While the state may not single out religious expression for special benefits, *Texas Monthly*, 489 U.S. at 15, neither may it single out religious expression for special disadvantage. *See, e.g., Widmar*, 454 U.S. at 276.

Furthermore, a facially discriminatory policy sends a message to religious persons that they are outsiders in the community due to their religious views. As this Court stated in *Mergens*, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248. *Accord* L. Tribe, *American Constitutional Law* 1175 (2d ed. 1988). By denying use of its auditorium to a film series on family issues solely because it contains religious viewpoints, the school district is informing religious adherents in the community that their views do not "pertain to the welfare of the community" (Section 414(c)), simply because their ideas are religious in nature. This impermissible message from the State to its citizens "is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), 5 *The Founders' Constitution*, at 83. *See also*, Locke, "A Letter Concerning Toleration," 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952) ("Whatsoever is permitted unto any of [the magistrate's] subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses.")

B. The school district policy creates unavoidable excessive entanglement of state officials with religious doctrine.

In addition to its facial invalidity, enforcement of a ban on religious expression creates an Establishment Clause nightmare, due to the resulting excessive entanglement between state officials and religious doctrine. Determining whether private speech is religious "could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar*, 454 U.S. at 272 n.11 (citation and quotation marks omitted). Moreover, as this Court has warned, "a denial of equal access to religious speeeh might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Mergens*, 496 U.S. at 253, (citing *Widmar*, 454 U.S. at 272 n. 11.)

This case confirms the worst fears concerning excessive entanglement. The school district clerk, who first reviewed applications for use of facilities, admitted in her letter of January 18, 1989, to Petitioner:

> "Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute 'religious purposes.' I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations."

(Jt. App. at 81.) She then requested "a more detailed description of your proposed use (including a brochure describing the film)." *Id.*

After examining the brochure, the clerk denied the request because "[t]his film does appear to be church related." (Jt. App. at 84.) At trial, the clerk specified three reasons why the district determined from the brochure that the film could not be shown: 1) the film advocated "a loving home where Christian values are instilled from an early age"; 2) in one part, Mrs. Dobson "recall[ed] the influences which brought her to a loving God"; and 3) Mrs. Dobson "has been active in a variety of Christian endeavors." (Tr. at 65-66 (test. of Alice Schoener).)[4]

The clerk's determination of "religious purpose" is only the beginning. The federal district judge, following Second Circuit precedent, was required to determine whether any previous group had used the facilities for a religious purpose.

Lamb's Chapel suggested several groups that seemed to have used the school facilities for an apparently religious purpose, including: the Salvation Army in a joint concert with the high school band at which an invocation was given and some religious music was played; a gospel

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[4] The school district may attempt to downplay its entanglement with religion by suggesting that little entanglement actually occurs because the prohibition on religious use is not vigorously enforced. The use of facilities by several groups for arguably religious purposes was unquestioned by the school district administration, as discussed *infra*, at pp. 28-29. However, failure to enforce consistently a policy that requires line-drawing between religious and nonreligious expression does not avoid violation of the excessive entanglement prohibition. Such an argument was rejected in *Texas Monthly* because it was still "open to future administrators to subject the content of religious publications to more exacting scrutiny." 489 U.S. at 20 n.9.

singing group, whose business manager testified as to the religious content of the music and the purpose of gospel music "to spread the good news about God;" and Dr. Jerry Huck, who expounded on parapsychology and Eastern mysticism in a series of lectures sponsored by the public library at school facilities.[5] (Pet. App. at 12-13a; 20a; 46a.)

In order to determine whether any prior use had been religious, the Court heard testimony from a number of witnesses, including a Salvation Army spokesperson, the business manager for the gospel singers, library series lecturer Dr. Jerry Huck, a person who attended two of Dr. Huck's lectures[6], and two expert witnesses on religion, specializing in cults and New Age religions. The district judge determined that Petitioners had not proved that any of the prior uses had been religious. (Pet. App. at 31a.)

The criteria that the judge used in determining whether a use was religious are the essence of excessive entanglement. For example, in attempting to determine whether the Salvation Army is religious, the judge

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[5] The Family Counseling Services sponsored by the Hampton Council of Churches used the school facilities over a period of time for counseling sessions, board meetings, and other uses (Tr. at 29-34 (test. of Ruth Bragarnick)), which would seem indistinguishable from a film series on family issues from a Christian perspective. A representative testified but the judge did not specify why its use was not religious.

[6] The witness testified that Dr. Huck denied in a lecture the truth of certain foundational beliefs of Christianity, such as the Deity of Jesus. (Tr. at 98 (test. of Rudolph Blaum).)

engaged in the following interchange with a Salvation Army administrator (Tr. at 46-47):

> "THE COURT [looking at a press release by the Salvation Army concerning the concert]: Do you consider the Salvation Army the Patchogue service unit, non-sectarian or sectarian?
>
> "THE WITNESS: I'm sorry, you are asking me?
>
> "THE COURT: Yes.
>
> "THE WITNESS: Non-sectarian.
>
> "THE COURT: In fact looking down the list of the chairman and the members of the board, I see all kind of names there.
>
> "THE WITNESS: Yes, it's totally volunteer.
>
> "THE COURT: And some of them I know as non-Christians.
>
> "THE WITNESS: Yes, sir.
>
> "THE COURT: If you want the Court will exemplify who I know on the list that is listed as the board of directors on the page, the middle, anyway.
>
> "MR. INFRANCO [co-counsel for plaintiffs]: It's not necessary, Your Honor.
>
> "MR. TRABOLD [co-counsel for defendants]: Not necessary, Your Honor."

The Second Circuit had similar problems determining the "religiousness" of the Salvation Army, gospel singers, and the lecturer on parapsychology and mysticism. In the end, it determined that even though there were "incidental" mentions of religion, there was "no religion in a meaningful way." (Pet. App. at 14a.)

Federal judges should not be making such inquiries. As the above interchange demonstrates, determinations as to whether a use is religious invite unintentional, but nevertheless unconstitutional, imposition of the personal religious biases of the judges. It is hard to "imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible." *Weisman*, 112 S.Ct. at 2671 (Souter, J., concurring) (nonpreferentialist interpretation of Establishment Clause would require judgments about religion). *See Smith*, 494 U.S. at 889 n.5 (judges should not regularly weigh the significance of religious practices); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987); *Widmar*, 454 U.S. at 269 n.6 (judiciary not competent to draw line between "religious worship" and "religious speech").

As this case demonstrates, allowing government officials to determine whether speech is religious provides fertile ground for discrimination among religions, which the Establishment Clause prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982). Officials' responses to requests for access may depend on their "comfort with mainstream religious views and discomfort with and perhaps hostility towards non-mainstream, non-traditional religious messages." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (access request by evangelical Christian speaker) (quotation marks omitted).

The safest route around the morass created by the decision below is the high ground this Court has already taken in *Widmar* and *Mergens*. A policy of equal access for religious expression is the best means of avoiding excessive entanglement of state officials in the thicket of religious doctrine.

C. The school district policy and state law grant unbridled discretion to a government official to license religious speech.

As this case demonstrates, enforcement of a facially discriminatory policy requires that government officials determine whether private citizens' speech is religious. Yet, over fifty years ago, this Court held that a government official could not exercise unbridled discretion to determine whether private citizens' speech was religious. *Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940).

Inability to articulate a consistent standard epitomizes the unbridled discretion condemned in *Cantwell*. However, the school district has failed to articulate any standard for determining when its ban on "religious purposes" is violated. The policy prohibits use "by any group for religious purposes," but the school district clerk admitted that she had *no standard* by which to determine what speech would constitute a "religious purpose." In her January 18, 1989, letter to Petitioner, she said:

> "Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute 'religious purposes.' I am hard pressed to determine, from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations."

(Jt. App. at 81.) Yet at trial, when asked whether "religious connotations" was the standard for the school district, the clerk responded: "This is a one-time event, so I would hesitate to say that that was the standard, a standard for the District." (Tr. at 63-64 (test. of Alice

Schoener).) In her February, 1989 letter, to Petitioner, permission was denied because the film was "church related". (Jt. App. at 84.) Yet, at trial, she admitted that churches were permitted to use facilities for recreational or athletic purposes. (Tr. at 69-70 (test. of Alice Schoener).)

Thus, the school district policy, both on its face and in its application, violates nearly every precept of the Religion Clauses. Government action that abandons the neutrality mandated by both Religion Clauses, that sends a message of hostility to religious citizens, and that entangles government officials and judges in subjective theological determinations, is unconstitutional.

II. DENIAL OF ACCESS IN THIS CASE TO A COMMUNITY GROUP WISHING TO SHOW A FILM SERIES WITH RELIGIOUS CONTENT VIOLATES THE FREE SPEECH CLAUSE.

A. The decision below contradicts this Court's decisions protecting citizens' religious speech against content-based censorship.

Content-based restrictions on religious speech have never been upheld by this Court. *See Mergens*, 496 U.S. 226; *Widmar*, 454 U.S. 263 (1981); *Fowler*, 345 U.S. 67; *Niemotko*, 340 U.S. 268. While a state may not give religious speech special advantages, *Texas Monthly*, 489 U.S. at 15, neither may it impose special disabilities on it. *See, e.g., Widmar*, 454 U.S. at 270.

The school district policy in this case is irreconcilable with this Court's decision in *Widmar*. As in this case, the university in *Widmar* did not deny *all* access to religious

groups but *conditioned* access upon the group agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265 n.3. The Court said state officials could not enforce such a ban. 454 U.S. at 269 n.6. While the school district relies on a state education law to justify the ban, the university claimed that its ban was required by the state constitution's stringent "establishment clause." The Court said that the free exercise and free speech claims of the group outweighed the state's interest in enforcing a purportedly more stringent state establishment clause. 454 U.S. at 276. As in *Widmar*, the school district through policy and practice has set aside the school facilities during certain nonschool hours for groups to use for expressive purposes. See pp. 19-24, *infra*. No compelling state interest supports the ban. Instead, as in *Widmar*, a policy of equal access avoids potential violations of the Free Speech, Free Exercise, and Establishment Clauses. *Widmar*, 454 U.S. at 271-275; *Mergens*, 496 U.S. at 252-253.

In the decade before this Court's decision in *Widmar*, a national trend began in which many government officials misconstrued the Establishment Clause to *require* censorship of private citizens' religious speech on public school property. *See Mergens*, 496 U.S. at 239. This case is a throwback to that pre-*Widmar* trend, in which New York state and federal courts were leaders.

In the decision which is at the root of the school board policy in this case, *Trietley v. Board of Educ. of City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App. Div. 1978), an intermediate New York state court interpreted Section 414 not to authorize school officials to allow students to meet before or after school on high school property for

religious speech, because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414," *id.*, 409 N.Y.S.2d at 915, noting that the federal Establishment Clause would be violated if such meetings were allowed.[7]

The following year, the Second Circuit prohibited equal access for student meetings for religious speech before and after school. *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Largely in reaction to the *Brandon* decision and its ensuing negative influence on school admininstrators and other courts across the nation, Congress passed the Equal Access Act in 1984. *Mergens*, 496 U.S. at 239.

[7] It is troubling that the *Trietley* decision should continue to work such mischief to federal first amendment rights. It is not a decision of a state court of last resort. Its construction of Section 414 consisted of only conclusory statements with no supporting analysis, despite the plain language of the statute that would seem to allow religious uses. N.Y. Educ. 414(c) ("social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"). The construction may be the result of the lower state court following the familiar rule of construction that statutes should be construed to avoid constitutional issues if at all possible. In 1978, a state judge could have believed that construing Section 414 not to allow religious uses avoided difficult, unresolved conflict between free speech and establishment clause concerns. However, the intervening decisions in *Widmar* and *Mergens* would now require a different construction of Section 414, its natural reading, in order to avoid constitutional problems.

The effects of these two cases continue to haunt religious speakers in the Second Circuit.[8] In clinging to the *Trietley* and *Brandon* premises that religious speech can be singled out for discriminatory treatment, the Second Circuit has created an irreconcilable contradiction within its own opinions: all religious uses of school facilities are prohibited – unless previous religious uses have been allowed by school administrators. *Deeper Life Christian Fellowship v. New York City Bd. of Educ.*, 852 F.2d 676, 680 (1988). In effect, the Second Circuit recognizes the practical unworkability of a discriminatory ban on religious speech but refuses to abandon the futile effort.

B. By policy and practice, Center Moriches school facilities are a designated public forum during specified nonschool hours for use by community groups.

This Court has defined three categories of publicly owned property: 1) traditional public forum, 2) designated public forum, and 3) nonpublic forum. *See International Soc. for Krishna Consciousness v. Lee*, 112 S.Ct. 2701, 2705 (1992) ("Lee"). The school facilities in this case have

[8] Although no longer good law for the named school district, (*see Board of Educ. of the City of Buffalo v. Burr, et al.*, Index No. 11097/88, order by Judge Leo J. Fallon (Sup. Ct. September 4, 1991) (permanent injunction against school district requiring it to allow student Bible study club to meet under Equal Access Act)), the *Trietley* ruling is still used elsewhere to deny school districts discretion to allow religious uses of school facilities during evening and weekend hours by community groups. (Br. for Resp't Att'y Gen. in Op. to Pet. for Cert. at 2; Br. of Def.-Resp'ts [School District] in Op. to Pet. for Cert. at 8.)

been opened during specified nonschool hours for expressive uses by a broad variety of community groups under state law and the practice and policy of the school district and, therefore, constitute a designated public forum.

The Second Circuit correctly determined that the school facilities at issue here "do *not* fall within the categor[y] of . . . 'non-public forum'. . . . " (Pet. App. at 9a (emphasis added).) The school district itself admits the facilities are *not* a nonpublic forum:

> [T]he Center Moriches Union Free School District pursuant to the provisions of Section 414 . . . have (sic) *established a limited public forum* restricting the use of the school district facilities to cultural and educational activities consistent with the school district's preservation of the facilities for school related business *and the welfare of the community* rather than the promotion of a private expression or purpose.

(Br. of Def.-Resp'ts [School District] in Op. to Pet. for Cert. at 3 (emphasis added)); *see also*, Section 414(c) ("social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community").[9]

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[9] *Amici* do not argue that the school facilities are a designated public forum during school hours or at times when the school chooses to close the facilities under content-neutral regulations pertaining to the time, place and manner of expression. Rather the focus is on the use of designated school facilities during specified nonschool hours by community groups. *See, e.g., Perry Educ. Asss'n v. Perry Local Educators' Ass'n*, 460 U.S. at 44 (focusing on whether school's internal mail system and

This case differs from the Court's recent nonpublic forum cases in that the school district has offered essentially *no* reason for regarding religious uses as different from other "social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The showing of the film series on family issues certainly seems to fall within the broad language of Section 414(c) and the school district policy.

The school district simply asserts its own circular definition of the forum: a use is not included in the forum if the school district has said it is not included. But having opened their facilities to a broad range of uses, the school district and state cannot now claim that their singling out of religious uses for exclusion is merely a matter of "defining the forum." The category of a designated public forum cannot be so easily manipulated out of existence. Indeed, under the school district's standard, the university's policy of excluding religious groups in *Widmar* would have been permissible: the university could have "defined" its forum as permitting all uses except religious ones, and the forum would "remain nonpublic except as to the specified uses," (Pet. App. 10a): that is, nonpublic as to religious uses.

The facilities and forum here are fully compatible with, and indeed conducive to, expressive activity. The school district has opened the school facilities as a meeting place for community groups for a variety of expressive uses, as in *Widmar*. Because the school facilities are

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teachers' mailboxes, as opposed to entire school, constituted a public forum).

made available only in evening hours, long after classes are over, such uses will not disrupt the educational purposes of the school. Because groups using the facilities meet in separate rooms and are allowed use only on an orderly first-come, first-served basis, it is unlikely that one group's activity will interfere with another group's use.[10]

For these reasons, this case is sharply different from those in which the Court has determined that a forum was nonpublic. *See, e.g., United States v. Kokinda*, 110 S.Ct. 3115, 3119 (1990) (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1973) ("Here, we have no open spaces, no *meeting hall*, park, street corner, or other public thoroughfare.") (emphasis added). Municipal airports, for example, are "commercial establishments," and "nearly all who visit [them] do so for some travel related purpose." *Lee*, 112 S.Ct. at 2707. Sidewalks leading up to the entrances of post offices may be "constructed solely to provide for the passage of individuals engaged in postal business." *Kokinda*, 110 S.Ct. at 3120. The federal government may regulate fundraising drives in the federal workplace "in order to avoid interruptions to the performance of the duties of employees" that might result. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 805-806 (1985). A school district may restrict access to an internal mail system used to communicate with its employees, especially to preserve labor peace, *Perry*, 460

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[10] Of course, the school may deny access to groups that would cause a disruption. *Mergens*, 496 U.S. at 241; *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969).

U.S. at 50 (1983), or create and subsidize a school newspaper as part of its curriculum for pedagogical purposes. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In each of these cases, the asserted forum for expressive activity would overlap, and potentially interfere, with the primary uses to which the government had dedicated the property. Hence, in restricting expression, "the government [was] acting as a proprietor, managing its internal operations." *Lee*, 112 S.Ct. at 2705.

By contrast, during *evening* hours – the relevant time for purposes of analyzing this case – those who visit Center Moriches schools do so only to participate in the forum that the school district has created.[11] Nothing in the record shows any incompatibility between evening use of the school for expressive activity and its daytime use for educating students. As such, by opening facilities in the evening to many uses but not to religious ones, the school has acted not as proprietor, but "as lawmaker with the power to regulate or license." *Lee*, 112 S.Ct. at 2705.

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[11] Importantly, the expression in this case is among people who want to receive the ideas conveyed by the film series. *Cf., Lehman*, 418 U.S. at 302 ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.") (citation omitted). The voluntary nature of the audience in this case contrasts with the unwilling recipients of solicitation in recent public forum cases. *See, e.g., Lee*, 112 S.Ct. at 2708 (noting "the disruptive effect that solicitation may have" on others); *id.* at 2713 (O'Connor, J., concurring); *id.* at 2721 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 733-34 (solicitation "is more intrusive and intimidating than an encounter with a person giving out information"); *Cornelius*, 473 U.S. at 805, 809-10 (purpose of Combined Federal Campaign to limit disruption of federal workplace that frequent solicitations were causing).

The school district claims that it is enforcing a ban on classes of speakers or entire topics of speech, but it is not. It has not restricted use of school facilities during non-school hours only to school-related groups or to school-related topics. *See Perry*, 460 U.S. at 45 n.7 ("A public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, (school board business).); *id.*, 460 U.S. at 41, 53 (1983) (noting that exclusive access policy did *not* apply to "meetings on school property after school hours"). Instead, the school district has opened its facilities to groups from the community as a whole. The school district has not banned such subject matter as family issues or parenting techniques. Instead, the record demonstrates religious groups have used the facilities for recreational and other uses, (Tr. at 69 (test. of Alice Schoener)), and that a family counseling service, affiliated with a religious group, used the school facilities for counseling sessions, board meetings, and a fundraiser. (Tr. at 34 (test. of Ruth Bragarnick).)

The lower court correctly concluded that the school district has created a designated public forum. It was incorrect in its conclusion that the school district has applied either a subject matter or speaker classification in prohibiting the film series.

C. The school's discriminatory suppression of religious speech is not narrowly tailored to achieve any compelling state interest.

In *Lee*, the Court also reaffirmed its admonition that regulation of a designated public forum "is subject to the same [stringent] limitations as those governing a traditional public forum." 112 S.Ct. at 2705 (citing *Perry*, 460 U.S. at 46). As this Court stated in *Widmar*, the school "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 454 U.S. at 270.

The state and school district do not really attempt to justify their ban on religious expression. They simply assert that they can have such a ban. They do not, because they cannot, seriously assert that the Establishment Clause prohibits equal access to public facilities for private citizens' religious expression. *See Mergens*, 496 U.S. at 252-253; *Widmar*, 454 U.S. at 271-275.[12]

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[12] Indeed, any argument by the school district or state that it may or must avoid association with private religious activity is even weaker than the argument that the Court rejected in *Mergens*. There the school district claimed that permitting *student* religious meetings on the same terms as other student groups would communicate school endorsement of the religious activity, largely because (it was claimed) "the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together." *Mergens*, 496 U.S. at 249. The Court rejected these arguments because meetings took place during "noninstructional time" and involvement by school officials was limited to "custodial oversight." *Mergens*, 496 U.S. at 251, 253; *id.* at 261 (Kennedy, J., concurring).

Nor can compliance with a state law, as construed by a lower state court to require discrimination, justify censorship of religious speech. *See Widmar*, 454 U.S. at 276 (state constitutional establishment concerns did not justify censorship of private religious speech); *McDaniel*, 435 U.S. 618 (striking down state constitutional provision that discriminated against religious persons).

D. Denial of access for the film series because it contained religious content is impermissible viewpoint discrimination and lacks any reasonable justification.

Even if this case did not involve a designated public forum, "restrictions on speech in nonpublic fora are valid only if they are 'reasonable' and 'not an effort to suppress expression merely because public officials oppose the speaker's view.' " *Lee*, 112 S.Ct. at 2712 (O'Connor, J., concurring) (citing *Perry*, 460 U.S. at 46). Nor may the restriction "be arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303.

1. *Discrimination against religious viewpoints.* By forbidding use of school facilities "for religious purposes," the school district has discriminated against religious

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Furthermore, undermining any argument that the school was concerned about violating the Establishment Clause is the fact that the school district allowed the Salvation Army Band to present a joint concert with its high school band and allowed a speaker to address metaphysical issues in a lecture series sponsored by the public library. This is not to say whether these uses violated the Establishment Clause, but that if Establishment Clause enforcement were the school district's concern, these other uses should have raised greater concerns.

viewpoints in relation to other viewpoints. The film series, which addresses family issues and discusses parental techniques, undoubtedly fits within the definition of "social, civic . . . and other uses pertaining to the welfare of the community." Nevertheless, it was excluded on the ground that it represented a religious viewpoint on those issues. Had Petitioners sought to show a film addressing the same subject but lacking a religious viewpoint, their application would have been approved. Such a distinction is viewpoint discrimination.

The court below and the Respondents have claimed that religion is merely a subject outside the subject matter of the forum and, therefore, excludable. But in the circumstances presented here, and in many others, "religion" is more than a "subject matter" that can be isolated from other subjects such as the "welfare of the community." Religion provides a viewpoint on a wide range of topics concerning how human beings can and should live together in communities. In other words, religion constitutes a viewpoint on a great many "social," "civic," and other issues "pertaining to the welfare of the community" – including, as in this instance, issues concerning effective means of raising families.

The position that religion is simply a separate "subject matter" from such social issues privatizes religion and denies its relevance to social and civic matters. Such a position is entirely at odds with our constitutional history and traditions. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 670 (1970); *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting); *McDaniel*, 435 U.S. at 641

& n.25 (1978) (Brennan, J., concurring). By defining religion as separate from social and civic issues, and excluding religious viewpoints from the forum on that basis, the school district skews public discussion of issues, such as family and parenting, by excluding religious viewpoints.

2. *Discrimination among religious viewpoints.* The school policy excluding "religious purposes," as applied by Respondents and the court below, has discriminated between religious viewpoints. As already discussed, the family counseling service, affiliated with a local council of churches, was permitted to use school facilities, but Petitioners were not permitted to express their religious viewpoint on family issues.

Similarly, the school district discriminated between religious viewpoints by permitting uses such as the Salvation Army Band joint concert with the high school band and the Southern Gospel Harmonizers' performance of religious songs. Petitioner presented evidence that " 'the Salvation Army is a church or a quasi-church,' " (Pet. App. at 12a)[13], and that the gospel singing group, whose business manager testified that gospel music was "the good news of God," sang a number of religious songs. (Pet. App. at 12-13a.) The Boy Scouts meet regularly in the school facilities.[14] The public library sponsored a speaker in the school facilities who addressed

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[13] *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

[14] *See Welsh v. Boy Scouts of America*, 787 F.Supp. 1511, 1515-1518, 1521 n. 23 (N.D. Ill. 1992) (district court findings as to important part religion fulfills in the scouting program, in civil rights lawsuit challenging Scouts' requirement that all members affirm a belief in a Supreme Being).

"Eastern mysticism" and other religious topics. (Pet. App. at 20a.)

Governmental distinctions between "meaningful" and "merely incidental" religious uses constitute discrimination against viewpoints that are more overtly religious. Presumably, had Petitioners eliminated or "soft-pedaled" the religious content of their presentation on the family, they would have stood a better chance of surviving the school district's inquiry into the purpose of their meeting. But the state may not, consistent with the First Amendment, review the content of private speech to determine whether it is "too religious," *see Cantwell*, 310 U.S. at 305, or give preferential access to some religious groups but not others. *See Valente*, 456 U.S. at 244-246.

3. *No reasonable justification.* At the least, the Court has "required some explanation as to why certain speech is inconsistent with the intended use of the forum." *Lee*, 112 S.Ct. at 2714 (O'Connor, J., concurring in the judgment). The school district and the state have offered no explanation why activity by a religious group speaking to questions of family and parenting is inconsistent with the intended use of its forum.

To justify the ban, the school district and state must claim that religious uses *per se* cannot be for "social" or "civic" purposes and cannot "pertain[] to the welfare of the community." Such a thesis is so plainly arbitrary and invidiously anti-religious that it cannot serve as a reasonable justification even in a nonpublic forum. *See McDaniel*, 435 U.S. at 628-29 (plurality opinion); *Widmar*, 454 U.S. at 280-281 (Stevens, J., concurring).

Under this Court's precedents, from *Cantwell* to *McDaniel*, *Widmar* to *Mergens* and *Weisman*, the school district policy violates the First Amendment mandate that government must be neutral in its treatment of religion and may not discriminate against private citizens' religious speech. Once again, religious persons are compelled to look to this Court to protect them from discriminatory censorship of their speech.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center For Law and Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its

full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make **no** law. . . . "

The U.S. Catholic Conference. The Roman Catholic Church, the largest religious denomination in the United States, has over 57 million adherents in 20,000 parishes throughout the country. All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Bishops' Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. The preservation of religious liberty through the proper interpretation of the First Amendment is one of the most important values that the Conference seeks to promote through its participation in litigation.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the establishment and free exercise clauses is essential to religious liberty for all

Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Home School Legal Defense Association is a national organization located in Paeonian Springs, Virginia. HSLDA was formed in 1983 and currently has over 27,000 families as members. The goal of HSLDA is to provide legal defense to protect and defend the rights of parents who choose to home educate their children. HSLDA attorneys have been involved in dozens of home school cases and have assisted in resolving thousands of legal contacts over the nation. HSLDA supports the constitutional right of religious speakers to have equal access to open forums.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Synod, on behalf of its congregations and individual members, is concerned with situations in which individuals' freedom to exercise their religion is infringed and in which government attempts to define religion, such as in the instant case.